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ABSTRACT

Issues pertaining to increasing government regulation of higher education, monetary and nonmonetary costs of such regulation, and court cases and legislation that illustrate the academic autonomy versus governmental interference conflict are considered in this book by a circuit judge. It is suggested that although colleges and universities have been involved in governmental regulations and court suits in the 1970s, they have fared well, especially when their dependence on governmental agencies for funding is considered. It is claimed that the criticism that the implementation of federal regulations is draining schools of too much money has not been substantiated. However, no one is sure how much federal regulation costs. It is suggested that as a critical element in society, education cannot expect to continue to be left completely autonomous, particularly since educational institutions have contributed to social injustices. One approach to determine the impact of governmental regulations is to study court opinions that have faced the conflict between the government's desire to implement public policies and the academicians' desire to remain autonomous from governmental interference. Significant legal developments in the following areas of special concern to educators are reviewed: employment discrimination, procedural due process for faculty, financial exigency as a ground for dismissal, procedural due process for students, Title IX, and the Rehabilitation Act of 1973. It is concluded that these developments demonstrate that the doctrine of academic abstention has remained substantially intact. It is predicted that in the next decade the disruptive effects of external regulations will likely decrease. Views expressed by the Sloan Commission on Government and Higher Education are considered. A bibliography is appended. (SW)

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by

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HIGHER EDUCATION AND THE UNHOLY CRUSADE
AGAINST GOVERNMENTAL REGULATION

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Harry T. Edwards was appointed to the United States Court of Appeals for the District of Columbia Circuit on February 20, 1980. Before being appointed to the D.C. Circuit, Judge Edwards was a Professor of Law at the University of Michigan Law School from 1970 until 1975, and from 1977 until 1980. He specialized in Labor Law and taught courses in Labor Arbitration, Collective Bargaining, Labor Relations Law in the Public Sector, The Lawyer as a Negotiator, and Higher Education Law. He has been a member of the faculty at the Institute for Educational Management at Harvard University since 1976, where he teaches a course in Law and Higher Education. He was a Professor of Law at the Harvard Law School from 1975 until 1977, and is now a Lecturer in Law at Harvard. During the winter of 1974, he was a Visiting Professor of Law at the Program for International Legal Cooperation at the University of Brussels.

He is a graduate of Cornell University (1962) and the University of Michigan Law School (1965). He graduated from Michigan with high distinction and was a member of the *Michigan Law Review* and the Order of the Coif (a national legal honorary society for academic achievement).

Judge Edwards is co-author of *Labor Relations Law in the Public Sector*, 2d ed. (Michie/Bobbs-Merrill, 1979), *The Lawyer as a Negotiator* (West Publishing Co., 1977), *Collective Bargaining and Labor Arbitration*, 2d ed. (Michie/Bobbs-Merrill, 1979) and *Higher Education and*

the Law (Harvard Univ., 1979). He has also written numerous articles dealing with labor law, equal employment opportunity, labor arbitration, and higher education law.

Edwards has been a member of the Board of Directors of the National Academy of Arbitrators and he was elected Vice President of the Academy in 1978. He has also been a member of the Board of Directors of the American Arbitration Association.

He has served as a member of the Executive Committee of the Association of American Law Schools, the Administrative Conference of the United States and the American Bar Association Commission on Law and the Economy.

In addition to his teaching, research and arbitration work, he was appointed by President Ford and President Carter to serve on the International Women's Year Commission (where he chaired the Rules and Credentials Committees). In 1977, he was appointed by President Carter to serve on the Board of Directors of Amtrak. He was elected Chairman of the Board of Directors of Amtrak in April 1979 and served in that position until February of 1980, when he resigned to take his position on the bench.

He was also the recipient of the Judge William B. Groat Alumni Award given by the School of Industrial and Labor Relations at Cornell University in 1978.

Judge Edwards is presently serving as a member of the National Advisory Council for the Institute for Educational Policy Studies at Harvard, and as member of the Advisory Council for the School of Industrial and Labor Relations at Cornell University.

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The author wishes to thank John Dwyer for his invaluable research assistance in the final preparation of this paper.

Mr. Dwyer received his B.A. degree from DePauw University in 1973. He finished with High Honors in chemistry and was elected to Phi Beta Kappa. He was awarded a Ph.D. in chemical physics from the California Institute of Technology in 1977. Between 1974 and 1978, he authored five scientific publications.

In June of 1980, Mr. Dwyer graduated from the law school at the University of California, Boalt Hall, in Berkeley, California. He received numerous academic awards at Berkeley and also served as the Editor-in-Chief of the *Ecology Law Quarterly* at Boalt Hall. He is presently working as a law clerk for Judge Edwards at the United States Court of Appeals for the District of Columbia Circuit. During 1981-82, he will serve as a law clerk for Justice Potter Stewart at the United States Supreme Court.

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I. Introduction

The past decade has witnessed an extraordinary proliferation of legislation, regulations, and judicial opinions affecting higher education. In response, a number of educators have sounded the alarm to protest the perceived over-regulation and alleged excessive governmental intrusion into the affairs of academe. Although many educators and administrators have expressed concern over the costs of governmental regulation, their principal fear seems to be that governmental interference will disturb the autonomy traditionally granted educational institutions.

Despite the increasing number of laws and court decisions affecting higher education, a dispassionate study reveals that these critics have grossly overstated the real impact of legal developments occurring in the 1970s. Furthermore, it can be argued that, during the coming decade, colleges and universities will likely suffer more from economic problems unrelated to direct governmental regulation of these institutions than from the regulations presently under attack.

A study of "law and higher education" necessarily focuses on each of the three branches of the Federal Government. One sort of federal law of importance to educators is judge-made, the archetypical example being a Supreme Court decision construing the United States Constitution. This source of law, however, does not impose significant restrictions on higher education. As the federal courts continue to eschew an activist role, especially in the enforcement of individual rights, their most significant role

is that of enforcing or striking down statutes or agency regulations.

In contrast to the diminishing importance of judge-made law, at least in the Federal Government, is the large growth in the number of statutes and regulations affecting higher education. During the past fifteen years there has been a steady increase in federal regulation of higher education, by both presidential Executive Orders and congressional acts.[1]

When one reviews the events of the past thirty years, however, this increase in federal regulation hardly seems surprising. To begin with, most other institutions of Amer-

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[1] Among the laws now affecting higher education are: Executive Order 11246 (as amended) (Affirmative Action), 30 Fed. Reg. 12,319 (1965); Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d & 2000e (1976); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1976); The Buckley Amendment, 20 U.S.C. § 1232g (1976); The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976); The Equal Pay Act of 1963, 29 U.S.C. § 206 (1976); The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976); The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 (1976); The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976); The Vietnam Era Veterans' Readjustment Assistance Act of 1974, codified in scattered sections of 38 U.S.C.; The Education Amendments of 1976 (Student Consumer Information), 20 U.S.C. § 1088b-1 (1976).

For a brief discussion of these and other laws *see* H. Edwards & V. Nordin, Higher Education and the Law, at 812-27 (Cambridge, Mass.: Harvard Univ., Institute for Educational Management, 1979).

ican life have become increasingly subject to federal regulation. This growth of federal control reflects in part a broad consensus that, without regulation, the regulated sectors would endanger workers or even nearby communities. In an effort to correct social harms not amenable to market pressures, Congress has enacted far-reaching environmental, housing, worker safety, and civil rights legislation. In order to implement the statutory commands, Congress has created agencies to issue regulations and empowered courts to enforce them.

In addition, universities and colleges have voluntarily emerged from their traditional isolation from societal pressures. In a number of important instances, educational institutions—or at least many of the faculty and students at these institutions—have led the march for social change.

Furthermore, about one-half of the colleges existing today were established between 1950 and 1975,[2] reflecting a new attitude about higher education: higher education is perceived as a key to social mobility and professional success. Consequently, higher education is now designed to train new adults to run our technological society, not only to carry on the traditions of scholarship. Moreover, today many people view higher educational institutions not simply as cloistered halls for scholarly research, but also as large scale employers.

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[2] The Sloan Commission on Government and Higher Education, A Program for Renewed Partnership, at 47 (Cambridge, Mass.: Ballinger Publishing Co., 1980) [hereinafter the "*Sloan Report*"].

In order to fulfill these expanded roles in research, training, placement, and employment, colleges and universities "must have money from the government to survive." [3] As educational institutions have become more dependent upon the government for financial support, and have become a key element in attaining the "good life," many people have demanded that these institutions become more accountable to public policies.

The growth of federal funding to higher education has been substantial. Shortly after World War II, governmental appropriations financed the construction of new facilities and provided scholarships and loans to students. Today federal aid to leading research institutions may constitute half of a university's total budget, paying for tuition, salaries, research programs, and facilities. Time magazine reported that, in 1978, for example, the Federal Government funded twenty-six percent of the budget at Harvard University, fifty percent at MIT, forty-six percent at Princeton, and seventeen percent at the University of Michigan.[4]

Of course, not all institutions of higher education have shared equally in the governmental subsidies. Nevertheless, the overall amount of federal support given to institutions of higher education has grown substantially during the past two decades. Indeed, the Sloan Commission on Government and Higher Education recently reported that the Federal Government currently provides between

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[3] *Id.* at 42.

[4] *See* Time, Apr. 30, 1979, at 52.

an eighth and a sixth of the aggregate fund revenues for all higher educational institutions.[5] Thus, it is clear that many colleges and universities have benefited from the infusion of public funds designated to upgrade research facilities and projects, improve educational programs, and provide financial aid to students. It is in light of this extensive federal support, which educational institutions have gladly accepted, if not actively sought, that we must review the educators' criticisms of federal intrusion into academe.

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[5] The *Sloan Report*, *supra* note 2, at 48.

II. Fear of Regulation

In one of the earliest and probably most balanced statements on federal regulation of universities, Harvard's President, Derek Bok, warned against ever-increasing federal regulation. In his report to the Board of Overseers for 1974-75, Bok recognized that universities and colleges had "opened the door" to federal regulation by continuing to accept larger and larger amounts from the federal treasury, usually "with strings attached." Bok also argued, however, that "the government has begun to exert its influence in new ways to encourage colleges and universities to conform to a variety of public policies." This pressure to conform, Bok believed, struck "directly at the central academic functions" of institutions of higher education. In short, he charged the government with using the power of the purse to alter and shape the academic priorities of universities, thereby violating the unwritten code of "academic abstention" and institutional autonomy that has long prevailed in the United States.[6]

Dallin Oaks, the President of Brigham Young University, has argued even more forcefully that, "[l]ike a business in financial peril, higher education's heavy dependence on federal financing has put it in danger of a receivership in which its management would pass to an absentee creditor in Washington."[7] Oaks contends that because of

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[6] *See generally* Edwards & Nordin, *supra* note 1, at 463-74.

[7] Oaks, *A Private University Looks at Government Regulation*, 4 J. of College and University L. 1, 1 (1976).

federal influence, other social justice goals have slipped ahead of purely educational goals, leaving higher education in danger of becoming one more regulated industry.[8]

A more recent attack against the Federal Government for interfering with higher education has come from University of Chicago sociologist Edward Shils. In delivering the 8th Annual Jefferson Lectures, sponsored by the National Endowment for the Humanities, Professor Shils charged the government with pursuing ideals that involve various forms of social engineering inimical to the traditional missions of higher education. Shils blasted what he called

> the ignorant "educationists" who preach day [in] and day out about the need for innovation in the university, about the need to meet "society's needs."[9]

According to Shils, these "ignorant educationists" are the

> claimants of the "new university" as the adjunct of government and as the solvent of social problems, as the promoter of economic growth and of the individual's maximization of his life-time earnings, as a device for changing society through criticism and as the redeemer of the past deficiencies of society.[10]

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[8] President Oaks' article contains several examples of university and college presidents strongly objecting to governmental interference with educational policy. *See id.* at 7-9. Oaks believes that a key source of protection for educational institutions is the First Amendment.

[9] E. Shils, *The Conflict of God and Caesar*, 8th Annual Jefferson Lectures, National Endowment for the Humanities (1979) (second lecture).

[10] *Id.*

The Sloan Commission on Government and Higher Education also has joined the chorus of critics decrying the intrusion of government into the affairs of the academy. In a report evaluating the relationship of government and higher education,[11] the Sloan Commission examined federal regulations affecting higher education, in particular statutes and regulations designed to ensure equal opportunity in higher education.

Unlike other, more strident critics, the Commission concluded that governmental regulation of higher education is a permanent feature of modern society. In the *Sloan Report*, the Commission recognized that the higher education community had no basis to exempt itself from most forms of governmental regulation common to other sectors of American society. Regulations involving worker safety, social security, and financial accountability for student aid and research funds, the Commission believes, while adding costs to financially beleaguered schools, are generally acceptable.[12]

The major complaint cited in the *Sloan Report*, reflecting the views of many educators and school administrators, is that equal opportunity regulations "do more than add to operating costs—they can affect the way colleges and universities perform their characteristic tasks."[13] Because courts, not agencies, enforce

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[11] *See* note 2, *supra*. *See also* Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U.L. Rev. 473 (1980).

[12] The *Sloan Report*, *supra* note 2, at 13-14.

[13] *Id.* at 86.

non-discrimination laws, the *Sloan Report* expresses a strong concern about the adversarial procedures used to resolve claims of discrimination.

> The Commission views the reliance on litigation as counterproductive since it reinforces adversary relations. It is also expensive and time-consuming. Though it has produced some results that might not otherwise have been realized, the question must be asked whether they justify the conflict, the cost, and the frequent failures not only for higher education and the government, but even for those the litigation seeks to protect.[14]

The Commission is also concerned that

> it is often difficult to be sure that all important interests are heard and their claims adequately evaluated [in court]. Specific court decisions may produce significant unintended consequences for parties not at the bar. Further, the adversarial cast of the trial process fosters tensions that may continue for years, tensions inimical to "that atmosphere which is most conducive to speculation, experiment and creation." [15]

As the *Sloan Report* makes clear, the Commission does not object to the goals of governmental regulations, including equal opportunity regulations. Rather, it seeks new procedures designed to lessen the impact of the regulations on academic freedom.

In order to alleviate the alleged damaging impact of equal opportunity regulations, the *Sloan Report* rec-

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[14] *Id.* at 10-11.
[15] *Id.* at 55.

ommends procedures designed to allow institutions of higher education to assume more of the responsibility for enforcing equal opportunity laws. The specific proposal of the Commission is to create a regulatory body (entitled the "Council for Equal Opportunity in Higher Education") that would consolidate all the functions of agencies presently enforcing equal opportunity in higher education. This new agency would have the sole power to issue regulations and rules, and impose sanctions, including the termination of federal funds. The agency would also be under a mandate to employ mediation and "other non-adversarial . . . techniques" to ensure compliance with equal opportunity laws.[16] So long as the agency keeps within a procedural timetable, individuals with complaints would be unable to go to court except to appeal final orders of the agency. In other words, individuals would normally be barred from seeking vindication of their rights in a court trial.

The significance of this proposal should not be lost in the seeming cloud of impressive rhetoric surrounding the recommendation in the *Sloan Report*. Because of the normal deference that appellate courts grant to agency decisions, complainants face a heavy burden of proof in order to secure reversal of an agency decision. With the option of court suit removed, most equal opportunity issues involving academe would be settled by a special interest agency created to deal ex-

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[16] *Id.* at 76.

clusively with problems in the higher education community.

It would be unfair to suggest that any special interest agency, such as the Council for Equal Opportunity in Higher Education proposed in the *Sloan Report*,[17] would be easily co-opted by the very institutions that it was created to regulate. Nevertheless, this possibility should not be ignored by any who would give the *Sloan Report* recommendation more than a passing glance.

The more serious problem with the recommendation in the *Sloan Report* is that it appears to be fundamentally absurd. In his dissent to this portion of the *Sloan Report*, Judge A. Leon Higginbotham, Jr., asks:

> If higher education is entitled to the special prerogatives of its independent Council for Equal Opportunity in Higher Education—reporting directly to the Secretary of Education, why shouldn't bankers be entitled to their Council for Equal Opportunity in Banking—reporting directly to the Treasury Department? Why shouldn't labor unions also have their special Council for Equal Opportunity in Employment—reporting directly to the Department of Labor? Why shouldn't physicians have their special Council of Equal Opportunity in Health Services—reporting directly to the Department of Health? In fact, why shouldn't any group have its own council reporting solely to its favorite department? [18]

Judge Higginbotham then observes that:

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[17] *Id.* at 75-76.
[18] *Id.* at 91.

Each of these professions requires certain subtleties in judgment which are not dissimilar to the problems one finds in higher education. The majority asserts:

> "In the final analysis, *faculty* status is not won in the courtroom. Remedies which compel employment or tenure ignore the sociology of the collegial structure. Remedies short of compelling employment, such as back pay, may recoup financial loss, but litigiousness is not an attribute which enhances standing with colleagues. An individual litigant may win the immediate battle at great emotional and economic cost, only to lose the academic war." (emphasis added)

If one deleted the word "faculty" and substituted one of several other professions in its place, the same argument could be made. I submit that it is better for victims to endure the emotional and economic cost of litigation than to win neither the "immediate battle" nor the academic war.[19]

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[19] *Id.* at 91-92.

III. The Costs of Governmental Regulation

While federal regulators have occasionally intruded unnecessarily into the affairs of academic institutions, many of the criticisms offered by commentators like Professor Shils sweep too broadly. Others, like the Sloan Commission, hearken back to a time that is no longer accurately reflected in today's educational institutions. In order to analyze these criticisms of governmental regulation of higher education, one must separately consider the tangible and the intangible costs. This division enables us to scrutinize with more particularity the effects of the regulation, and to identify where our knowledge is incomplete.

A. *Monetary Costs*

During the past five years several public and private educational institutions have attempted to measure the impact of federal regulations on higher education. The American Council on Education and the Sloan Commission on Government and Higher Education also have sponsored projects designed to reach general conclusions. In surveys designed to measure the impact of regulations, many institutions have responded that there are too many regulations, requiring unnecessary paper work, wasting time and money, distracting the institution from its major

function of education, and forcing it to become a bureaucratic arm of the government.[20]

The educators' complaints cannot be ignored because they highlight some important problems faced by higher education as a result of external regulation. Institutions of higher education face increasingly complex federal bureaucracies administering extensive, overlapping and sometimes inconsistent regulations. However, a Sloan Commission survey conducted in 1977 indicates that some of the institutional discomfort with the Federal Government results from the newness of the relationship between the government and higher education, and from the natural resistance that comes with having to give up any amount of independence.[21] The Sloan Commission survey reports

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[20] Notwithstanding these responses, the general policies that the Federal Government is promoting are often goals to which university educators and administrators subscribe. Many of the objections posed by critics are to the *procedures* used to implement federal regulations rather than the *principles* of the legislation. *See* the *Sloan Report, supra* note 2, at 9-11; Kershaw, Government and Higher Education—A Survey of 21 Institutions, at 4 (Oct. 1977) (prepared for The Sloan Commission on Government and Higher Education).

[21] This unfamiliarity with regulation is reflected in the common complaints of the institutions: the Federal Government has no understanding of the financial burdens that its regulations place on institutions; the government and those who draw up regulations do not understand how colleges and universities work; the administrative procedures seem to be based on the presumption that educational institutions want to thwart governmental goals; and even frivolous claims of discrimination set the wheels of the government in motion. Kershaw, *supra* note 20, at 21-22.

that each institution in the survey considered the amount of federal funds received to be far greater than the costs imposed by the governmental regulations.[22] While there may have been significant unquantifiable costs associated with the regulations, many of the institutions surveyed viewed the monetary costs of dealing with the Federal Government as a bargain.[23]

It is difficult to determine precisely the actual costs of federal regulation since, even without the regulations, colleges and universities themselves would have made some of the expenditures in implementing policies desired by the institutions. While some educational administrators believe they are spending vast sums to comply with fed-

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[22] Institutions reported funds received/funds expended ratios from 3/1 to 8/1. *Id.* at 3.

[23] The Sloan survey also shows a vast difference in the effect of regulations on small colleges and on large universities. Small colleges found compliance less costly, needing to hire only an additional clerk and increase slightly their use of legal counsel. Large universities, on the other hand, reported that federal regulation meant a greater bureaucracy, including new offices, officials, computer programs, and committees, thereby giving the appearance that the regulations reach further toward the core of the institution. *See* Kershaw, *supra* note 20, at 4-5. Some researchers have found that larger institutions, which are more visible to the public and enforcement agencies, are under greater pressure to comply with federal regulations. The less visible institutions tend to follow the carcass-strewn paths developed by the more visible. Van Alstyne & Coldren, The Costs of Implementing Federally Mandated Social Programs at Colleges and Universities, at 16 (June 1976) (prepared for the American Council on Education).

eral regulations, the Sloan Commission survey reports that these institutions are spending only one to two percent of their total operating budgets in federal compliance.[24]

Moreover, the costs of implementing the same federal regulations should decrease over time since the start-up costs for developing new systems of reporting and record keeping are high. As an institution becomes more familiar in working with the government, and as agencies refine procedures to fit universities' needs, the incremental costs decrease. Additionally, having already developed the procedures that comply with a set of particular federal programs, it becomes less costly to adapt the system to meet new programs.

In order to make useful statements about the costs of governmental regulations in higher education, we need current data that take into account differences between major types of institutions and between geographic regions. Unfortunately, this kind of information is more difficult to establish for higher educational institutions than for industrial firms because:

> First, performance objectives [in universities] are less easily stated in quantifiable terms; and second, consolidated financial data are generally not available for a

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[24] Kershaw, *supra* note 20, at 23. An earlier and perhaps more objective economic analysis of the cost of implementing federally mandated social programs in 1974-75 reported that individual institutions spent between one and four percent of their total operating budgets on compliance. Van Alstyne & Coldren, *supra* note 23, at 14.

college or university, because standard college accounting shows the college, not as an operating entity, but rather as an aggregation of separate funds designed to serve fiduciary responsibilities to those who provide the funds for support.[25]

These problems make it difficult to evaluate the validity of subjective reports from individual institutions on the costs of regulation.[26] Nevertheless, from existing reports we can

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[25] Van Alstyne & Coldren, *supra* note 23, at 24.

[26] The Sloan Commission concludes that it is difficult to estimate the costs associated with general health and welfare, pay, and environmental regulations. The *Sloan Report, supra* note 2, at 85. The monetary costs associated with equal opportunity regulations should be equally difficult to estimate.

Furthermore, over time, educational administrators sometimes change their initial conclusions about which regulations are costly. For example, in a 1977 study, Oregon State University considered the effect of the Buckley Amendment. The University found that while start-up costs (including revising University records policy, devising means of publicizing the new regulations, and conducting staff meetings to explain the policy) were significant, the costs incurred were in line with an existing trend in the University to improve student record keeping. Although University administrators had been anxious about the amount of activity that the Buckley Amendment would generate, their report observed that "publicity accompanying the enactment of this new law prompted only four students to request access to their files in the Office of Student Services." Oregon State University Government Impact Study, at 12 (Oct. 1977). It is noteworthy that officials at Oregon State concluded that, although the Buckley Amendment had eroded relations between the University and external agencies, "the Act [had] not appreciably affected the internal operations of student services functions." *Id.* at 13.

tentatively conclude that the financial benefit derived from governmental assistance outweighs the financial costs of regulation.

B. *Non-monetary Costs*

As many university administrators and educators see it, the real issue is not the cost of governmental regulations but rather the nature of their impact on the academic community. In particular, the academicians fear that equal opportunity regulations distort academic processes and impinge on traditional notions of academic freedom.

Sociologist Edward Shils has focused his attack on regulations implementing legislation covering university employment practices. Although Shils recognizes the necessity and validity of the government's financial support of colleges and universities, he believes that much of the recent anti-discrimination legislation interferes with the very essence of higher education—the faculty appointment process. He chastises the Federal Government for diminishing the value of intellectual criteria in order to elevate ethnic and gender-based criteria. Shils believes that because affirmative action policies conflict with the ideal of color blind and gender blind equality of opportunity, which reward individuals on the basis of meritorious achievement, universities today risk producing mediocre research and students.[27] The same concerns, expressed more subtly, are contained in the *Sloan Report*.[28]

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[27] Shils, *supra* note 9.

[28] The *Sloan Report*, *supra* note 2, at 61.

There are two major problems with the assumptions underlying the theses in Shils' paper and the *Sloan Report*. A first problem is their assumption that the civil rights movement has so enlightened educational administrators about the subtleties of institutional racism and sexism that they can be trusted, without governmental intervention, not to repeat the social injustices of the past. This view is at best naive and without evidentiary support.

The Sloan Commission's position is highlighted by reference to a quotation by Justice Frankfurter, which is cited at the beginning of Chapter 3 of the *Report:*

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "four freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Following this quotation, the *Sloan Report* then asserts that "[e]qual opportunity regulation is administered today in a way that is not in keeping with our tradition." [20]

Yet, one must question the traditions to which the *Sloan Report* looks so longingly. Judge Higginbotham, in his dissent, aptly observes that:

> the Commission seems to identify more closely with the problems of the present college administrators and the present tenured faculty than it empathizes with the victims of discrimination. . . . When Justice Frankfurter

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[20] *Id.* at 53.

> taught at Harvard Law School women were precluded. None were admitted to Harvard Law School until the 1950s. In addition, during that time it was rare if there were more than four or five black students in the entire Harvard Law School.[30]

Given the history of bigotry and discrimination in academe, there is no reason to believe that universities and colleges are more qualified to eliminate unlawful discrimination than are other institutions. As Judge Higginbotham noted in his dissent:

> The civil rights laws were not designed to give college faculties any special immunity from the challenges of equal opportunity which confront our society generally. . . .
>
> Tragically the bottom line and inherent logic of the majority's report is: Why shouldn't the EEOC and all other civil rights agencies be abolished so that each "unique" interest will have its special council to give it the extra sensitivity it believes its discipline deserves? . . .
>
> In my view if the nation takes seriously the majority's proposal to dismantle and restructure the present civil rights regulatory process, I fear that the progress of the future will be miniscule, if there is any at all. Enacting the majority's proposals could result in keeping further from the mainstream those who for so many years have been traditionally excluded or discouraged and who at long last are securing partial access to the system. The ultimate irony will be that such a demise was precipitated by brilliant scholars and administrators who have spoken so boldly for social and racial justice, while pro-

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[30] *Id.* at 90.

posing a regulatory process which precludes their attainment.[31]

A second problem with the Shils paper and the *Sloan Report* is their commonly held assumption that affirmative action, involving considerations of race and gender in the academic appointment process, necessarily leads to the appointment of less qualified teachers and scholars. The assumption is certainly a popular misconception, one that in some unfortunate cases has been supported, but it is not one that the Federal Government, or anyone else, seeks to promote.

Shils and other critics also suggest that the government actually determines faculty appointments, thus striking at the heart of academic discretion. A careful examination of the regulatory process, however, shows that the real impact of non-discrimination and affirmative action programs has been grossly exaggerated by those who are critical of recent legal developments.

A mere enumeration of federal statutes and court cases involving colleges and universities reveals little about the overall effect of legal developments on higher education. Although agencies have promulgated a significant number of employment regulations affecting higher education, there are many who argue that these regulations have had little if any significant impact on academia. For example, Villanova University, in its governmental impact study for the Sloan Commission on Government and

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[31] *Id.* at 91-93.

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Higher Education, reported that governmental programs that were meant to bring about significant changes on the campus had a very conservative impact or none at all.[32]

It is difficult, however, to assess the subjective judgments of educators on the impact of federal regulatory agencies. While such judgments, based on routine experiences with agency officials, are useful, they are not open to systematic scrutiny. A more useful approach is to examine one aspect of the regulatory process, one with concrete examples that can be analyzed.

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[32] Dellapenna, *The Impacts of the Federal Government on Villanova University*, The Sloan Commission on Government and Higher Education, at 157 (undated).

IV. Academic Abstention and Judicial Deference

Because the central issue in the minds of many educators is academic freedom, one approach to determine the impact of governmental regulations is to study court opinions that have faced the conflict between the government's desire to implement public policies and the academicians' desire to remain autonomous from governmental interference. Although judicial decisions do not cover the entire range of complaints voiced by educators, they at least provide a well-defined data base from which to analyze the effectiveness of agency enforcement efforts. Although many cases are surely settled before litigation is concluded, the case law reflects the degree of deference that courts, and consequently, over time, agencies, give to traditions of academic autonomy.

The ideological basis for academic autonomy was established at the formation of universities in the twelfth and thirteenth centuries, and the concepts of academic freedom and institutional autonomy today reflect this foundation. In the United States, as elsewhere, the role and functioning of the university is defined more in customs than in formal legal relationships. Historically, American courts have adhered to the doctrine of academic abstention in order to avoid excessive judicial oversight of academic institutions.

The doctrine of academic abstention probably has

been most clearly stated in some recent cases involving claims of sex discrimination, in which none of the first few dozen reported cases were decided in favor of the plaintiff. The classic statement of the doctrine is found in *Faro v. New York University*,[33] where the Second Circuit Court of Appeals noted that:

> Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.

The decision in *Faro* expresses the fear that court supervision of faculty hiring and tenure would eliminate peer review by faculty colleagues.

Many believe that collegiality and peer review are the foundations of academic freedom. Only last term, in *NLRB v. Yeshiva University*, the Supreme Court observed that "traditions of collegiality continue to play a significant role at many universities." The Court then noted that, because of these "traditions of collegiality," the National Labor Relations Board has "recognized that principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.' "[34] As the *Sloan Report* emphasizes, "faculty status is not won in the courtroom. . . . [L]itigiousness is not an attribute that enhances standing with colleagues."[35]

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[33] 502 F.2d 1229, 1231-32 (2d Cir. 1974).
[34] *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980).
[35] The *Sloan Report*, *supra* note 2, at 61.

In recent years courts have overcome some of their traditional reluctance to hear cases involving academic institutions; an increasing number of decisions have begun to define the universities' legal rights and responsibilities. However, a review of significant legal developments, in areas of special concern to educators, demonstrates that the doctrine of academic abstention has remained substantially intact. Perhaps this is as it should be. Nevertheless, the courts' hesitation to disturb educational autonomy leads to the conclusion that the critics of governmental regulation have overstated their case.

A. *Employment Discrimination*

For almost a decade now, federal courts have used Title VII of the Civil Rights Act of 1964[36] and sections 1981 and 1983 of the Civil Rights Acts of 1866 and 1871[37] to order make-whole remedies for minorities and women who have suffered unlawful employment discrimination. During much of this same period, the Office of Federal Contract Compliance has, under Executive Order 11246, required federal contractors to implement affirmative action programs to increase and improve the quality of job opportunities for minorities and women.

However, there are current signs of diminished effectiveness in the enforcement of the legislated proscriptions

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[36] 42 U.S.C. § 2000e (1976).
[37] 42 U.S.C. §§ 1981, 1983 (1976).

of employment discrimination against minorities and women. For example, a number of significant Supreme Court decisions issued during the past few years appear to have narrowed the relief available under the civil rights acts.[38]

One such decision is *Board of Trustees of Keene State College v. Sweeney*.[39] In a five-to-four decision, the Supreme Court reversed a lower court holding that the defendant had violated sex discrimination laws in failing to promote a faculty member. The majority reasoned that the court of appeals had improperly required the college to "prove absence of discriminatory motive," instead of simply articulating "some legitimate, nondiscriminatory reason for the employee's rejection."[40] When coupled with

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[38] *See* Edwards, *The Coming of Age of the Burger Court: Labor Law Decisions of the Supreme Court During the 1976 Term*, 19 B.C.L. Rev. 1, 4-36 (1977); Edwards, *Affirmative Action or Reverse Discrimination: The Head and Tail of* Weber, 13 Creighton L. Rev. 713, 714-22 (1980).

[39] 439 U.S. 24 (1978), *judgment of district court affirmed following remand*, 604 F.2d 106 (1st Cir. 1979).

[40] *Id.* at 24. The dissenting justices point out that the majority opinion reads the court of appeals' decision out of context. Previous opinions had used the words "prove" and "articulate" interchangeably.

Under current case law, the Title VII plaintiff has the initial burden of proving a "prima facie" case of unlawful discrimination. At that point the burden shifts to the employer to articulate a legitimate reason for its employment decision. It is this burden that *Sweeney* may have lightened. If the employer can successfully carry this burden, and it is rare when it cannot, the plaintiff must prove that the articulated reason is a pretext.

the reluctance of courts to review university employment practices, decisions like the one in *Sweeney* may leave academic institutions relatively free from judicial scrutiny in the area of employment discrimination. As one court has noted:

> [M]any courts . . . have [accepted] the broad proposition that courts should exercise minimal scrutiny of college and university employment practices. Other courts, while not citing *Faro*, have concurred in its sentiments.
>
> This anti-interventionist policy has rendered universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. (Footnotes omitted.)[41]

What is particularly noteworthy is that this anti-interventionist position adopted by many courts seems at odds with congressional intent. Originally, Title VII contained an exemption for faculty employment practices. The Equal Employment Opportunity Act of 1972, however, amended Title VII to eliminate this exemption.

> There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees—primarily teachers—from Title VII coverage.

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[41] *Powell v. Syracuse University*, 580 F.2d 1150, 1153 (2d Cir. 1978). For a list of cases adopting the "anti-interventionist policy," *see id.* at 1153 nn. 8 & 9. The majority in *Powell* purported to reject the common "anti-interventionist" interpretation of *Faro*. The dissenting judge in *Powell*, who authored *Faro*, rejected the majority's position as dicta. *See id.* at 1157.

> Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment.[42]

Nonetheless, because courts often have refused to scrutinize carefully academic employment decisions, it is plain that higher education has suffered little at the hands of the judiciary under Title VII and other civil rights acts.[43]

There is no intention here to suggest that institutions of higher education have won every case under Title VII. Quite the contrary, there have been several instances in which colleges or universities have settled with plaintiffs or have been found to be in violation of Title VII and, consequently, have been required to give appropriate relief to individual victims of discrimination.[44] However, not much can be made of these occasional losses, for it

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[42] H.R. Rep. No. 238, 92d Cong., 2d Sess. 19 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 2137, 2155.

[43] The extent to which the critics of governmental regulation are willing to carry their case was recently demonstrated in a sex-discrimination suit involving the University of Georgia. In that case a professor decided to go to jail rather than obey a court order to reveal his vote on a tenure decision. In explaining his decision to jail the professor, the judge reportedly wrote that the professor could cite no statutory or constitutional authority that would exempt the tenure vote from discovery procedures. Noting that exempting such votes from discovery would allow covert violation of anti-discrimination laws, the judge compared the professor's position to the blackball system used by the judge's college fraternity. *See* N.Y. Times, Sept. 14, 1980, at 1, col. 3.

[44] *See, e.g., Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). In *Kunda* the court of appeals affirmed the trial court's judgment that the college had unlawfully discriminated against the

hardly can be suggested that victims of unlawful discrimination should be left remediless in the name of academic freedom.

B. *Procedural Due Process for Faculty*

One area of the law that blossomed briefly but later died involves "procedural due process" for faculty mem-

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plaintiff in denying her tenure. The court was careful to discuss at length the importance of academic autonomy:

> Wherever the responsibility [for judging candidates] lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure.

Id. at 548. Nevertheless, because of the unique circumstances of this case, the court affirmed the trial court's remedy of reinstatement, promotion, and the opportunity to complete the objective requirements for tenure (after which the college would be required to grant her tenure). The court noted that:

> The distinguishing feature in this case is that Kunda's achievements, qualifications, and prospects were not in dispute. She was considered qualified by the unanimous vote of both faculty committees which evaluated her teaching, research and creative work, and college and public service. Her department chairman consistently evaluated her as qualified. Even Dean Secor, who did not affirmatively recommend Kunda, commented favorably on her performance, which he rated as "justify[ing] a permanent appointment."

Id.

bers. Procedural due process, which for state-supported institutions arises under the Fourteenth Amendment, ensures that faculty members who are subjected to discipline or other adverse actions at public institutions receive a notice of charges and some opportunity for a hearing.

In 1972, the Supreme Court broadly defined procedural due process for faculty members in two landmark decisions, *Board of Regents of State Colleges v. Roth*[45] and *Perry v. Sindermann*.[46] In *Roth* and *Sindermann* the Court ruled that faculty members who were subject to dismissal were entitled to procedural due process (1) if they had a "property interest" in continued employment (such as tenure), or (2) if they possessed *de facto* tenure (i.e., a reasonable expectancy of continued employment), or (3) if the action taken against them adversely affected a "liberty interest" (e.g., reputation or ability to secure comparable employment). Eight years after *Roth* and *Sindermann*, a survey of the case law reveals that *de facto* tenure is dying and liberty interests never came to life. While the courts use tenure to protect professors from dismissals without cause, they have rarely extended the concept beyond the limits strictly necessary to protect academic freedom.

De facto tenure was never an enduring source of protection. Because claims to a property interest in employment are generally grounded in state law,[47] public insti-

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[45] 408 U.S. 564 (1972).

[46] 408 U.S. 593 (1972).

[47] In *Roth* the Court stated that "[p]roperty interests, of

tutions can readily avoid due process procedures by amending policies so as to provide no expectation of continued employment. In effect, the constitutional claims of faculty members are defined not by federal courts but by state authorities.

The Supreme Court has seemingly abandoned the suggestion made in *Roth* that procedural due process will be required where dismissal charges might seriously damage the individual's reputation or ability to secure other employment (the so-called "liberty interest"). In *Bishop v. Wood*,[48] the Court ruled that the dismissal of a public employee for allegedly failing to follow orders and causing low morale did not interfere with any "liberty interest" in reputation since the employer had not publicly disclosed the grounds for dismissal. Under the *Bishop* holding, so long as the public employer does not publish the damaging information, he presumably may dismiss an employee for false and damaging reasons without affording the employee a hearing.[49] A number of scholars have noted that this simple circumvention of the "liberty interest" branch of *Roth* fails to take into account the situation that a dismissed employee faces: no college will hire a professor

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course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." 408 U.S. at 577.

[48] 426 U.S. 341 (1976).

[49] Of course, a different result might obtain if the employee had a claim under the "property interest" branch of *Roth*.

without first reviewing the reasons for his dismissal from his last job. Thus, the professor often will have no choice but to reveal the damaging information that he or she had no chance to rebut.

C. *Financial Exigency As a Ground for Dismissal*

Even when a faculty member has tenure, he or she may be dismissed without a hearing if the institution claims the dismissal is based on a financial exigency. As one court has noted:

> [W]here lack of funds necessitate[s] releasing a sizeable number of the faculty, certainly it [is] peculiarly within the province of the school administration to determine which teachers should be released, and which retained.
>
> Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts which it believes for the best interest of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion or other such motives it is not the province of a court to interfere and substitute its judgment for that of the administrative body.[50]

Recently, because of declining enrollments, increased costs due largely to inflation, and other financial difficulties, faculty dismissals justified on the school's financial condition have increased.

The lead case in this area is *American Ass'n of Univ.*

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[50] *Levitt v. Board of Trustees of Nebraska State Colleges*, 376 F. Supp. 945, 950 (D. Neb. 1974).

Professors v. Bloomfield College.[51] A primary issue before the state court was whether the college faced a bona fide financial exigency that would justify its dismissal of thirteen tenured faculty members. The appellate court in *Bloomfield* affirmed the trial court's ruling against the college, but only because it found that the college was motivated *not* by an attempt to alleviate economic stress, but rather by a desire to effectuate a plan to eliminate tenure altogether. However, the decision in *Bloomfield* acknowledged that courts will not disturb bona fide business judgments made to solve financial crises.[52]

In a more recent state case, *Scheuer v. Creighton University*,[53] the Nebraska Supreme Court held that the term "financial exigency," as used in a tenured professor's employment contract, could refer to a financial crisis limited to a department or college of the institution. The court upheld the dismissal of a tenured faculty member

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[51] 136 N.J. Super. 442, 346 A.2d 615 (App. Div. 1975).

[52] The college had decided to continue to hold its substantial real estate properties intact, rather than to convert them to cash to cover its immediate financial needs. The court held that such a decision was a "business judgment . . . exclusively for the board of trustees of the college and not for the substituted judgment of the court. . . . [The decision not to sell the real estate holdings] is a policy choice for the institution. Its choice of alternative is beyond the scope of judicial oversight in the context of this litigation." *See* 346 A.2d at 617. Numerous other courts have adopted the standards set forth in *Bloomfield*. *See, e.g., Krotkoff v. Goucher College*, 585 F.2d 675, 680-81 (4th Cir. 1978).

[53] 199 Neb. 618, 260 N.W.2d 595 (1977).

whose program area was eliminated, even though the school as a whole was not faced with a financial emergency.

A principal problem with the *Scheuer* definition of financial exigency, at least from the faculty member's perspective, is that it seemingly gives the university a free hand to release tenured faculty. Since most university programs can be run at a deficit, which is all *Scheuer* seems to require for dismissal, tenured faculty have little protection.[54]

Of course, the current case law still affords tenured faculty persons broad protections against wrongful dismissal for causes other than financial exigency. However, the courts have made it clear that, except in rare circumstances, decisions concerning the proper allocation of operating funds, program discontinuances, additions or modifications, and control over capital assets, are matters for university administrators, not judges, to determine.

D. *Procedural Due Process for Students*

Recent court opinions indicate that, as with the faculty cases, procedural due process protections for students

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[54] These cases point up an irony in the current outcry by educators against agency and judicial intrusion into academic affairs. In most cases involving faculty dismissals based on financial exigencies, courts have been deferential to the needs of the *institution*. Those cases leave the educators themselves procedurally unprotected from dismissal.

may be suffering a decline. For decades courts refused to intervene in the university's punishment of a student, in the belief that the institution was the best judge of what was a fair penalty for misconduct. The first case to break with the long-standing tradition of judicial noninterference and to provide some procedural protection for students in higher education was *Dixon v. Alabama State Board of Education*.[55] In *Dixon*, school officials, without any prior notice or hearing, expelled college students who had participated in a sit-in at a segregated lunch counter. Reversing the district court's dismissal of the students' suit for injunctive relief, the court of appeals held that the school must give the students notice and some opportunity for a hearing before they could be expelled for misconduct. The *Dixon* opinion noted, however, that procedural due process did not require a full-fledged judicial hearing in such cases.[56]

In 1978, in *Board of Curators of the University of Missouri v. Horowitz*,[57] the Supreme Court drew a distinction that may limit the procedural due process entitlement available to students. In *Horowitz*, the university had dismissed a medical student for alleged deficiencies in her clinical skills. In response to her demands for an appeal from dismissal, the school asked seven physicians to evaluate her clinical abilities. After reviewing their evaluations

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[55] 294 F.2d 150 (5th Cir. 1961).
[56] *Id.* at 159.
[57] 435 U.S. 78 (1978).

of her work, the school reaffirmed its decision to dismiss the student.

The Supreme Court declined to reach the plaintiff's claim that she has been denied due process, in violation of a liberty interest. Justice Rehnquist, writing for the majority, concluded that even "[a]ssuming the existence of a liberty or property interest, [Horowitz] has been awarded at least as much due process as the Fourteenth Amendment requires." [58]

The noteworthy aspect of the case, however, lay in the Court's distinction of "academic" and "disciplinary" cases. The majority observed that:

> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full hearing requirement.[59]

Although some scholars have questioned the Court's distinction between the due process rights available to students in academic and in disciplinary proceedings, the outcome in *Horowitz* is hardly surprising or unreasonable. The principal point about *Horowitz* and other due process cases is that the courts are sensitive to unnecessary judicial intrusion into academic affairs, and seek to preserve traditional notions of institutional autonomy.

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[58] *Id.* at 84-85.
[59] *Id.* at 89.

E. *Title IX*

In contrast to the procedural due process cases that limit individuals' rights to administrative hearings, the Supreme Court, in *Cannon v. University of Chicago*,[60] upheld an individual's right to sue under Title IX. Unlike the due process claims, however, which were based on the Constitution and would represent judge-made extensions of the law, *Cannon* is based on persuasive evidence that Congress intended to permit individuals to sue under Title IX to vindicate their statutory rights.

The Court rejected the universities' argument that such litigation "will have an adverse effect on the independence of members of university communities . . . [since that argument] addresses a policy issue that Congress has already resolved."[61] Furthermore:

> Although victims of discrimination on the basis of race, religion, or national origin have had private Title VI remedies available at least since 1965 . . . [the university has] not come forward with any demonstration that Title VI litigation has been so costly or voluminous that either the academic community or the courts have been unduly burdened. Nothing but speculation supports the argument that university administrators will be so concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner.[62]

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[60] 441 U.S. 677 (1979).
[61] *Id.* at 709.
[62] *Id.* at 709-10.

In a footnote, the Court further explained that the disruption to the academic community caused by occasional litigation was small compared to the disruption that would be caused by the administrative remedy—a cutoff of funds.[63]

Whatever the opinion may say about access to courts, however, it does not ensure that claimants are now more likely to prevail on the merits of their claims against universities or colleges. Indeed, if the history of Title VII litigation is any guide for what might happen under Title IX, few individual plaintiffs will prevail on their substantive claims of discrimination.

F. *The Rehabilitation Act of 1973*

The Supreme Court's support for judicial deference on substantive claims was recently illustrated in *Southeastern Community College v. Davis*.[64] In *Davis*, the plaintiff filed a charge of discrimination under the Rehabilitation Act of 1973[65] after she was denied admission to nursing school because she was deaf. She had contended in part that the Act required the school to take affirmative steps to accommodate her physical disability. The Supreme Court unanimously upheld the college's decision, noting that:

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[63] *Id.* at 710, n. 44.
[64] 442 U.S. 397 (1979).
[65] 29 U.S.C.A. § 794 (Supp. 1979).

> It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program.
>
> . . .
>
> In this case, however, it is clear that [the school's] unwillingness to make major adjustments in its nursing program does not constitute such discrimination.[66]

In its conclusion, the Court held that "[n]othing in the language or the history of [the Act] reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program." [67] Ever sensitive to the "special needs" of higher education, the Court in its opinion demonstrated an unwillingness to interpret broadly statutes affecting higher education.

The Court, of course, is not the only branch of government sensitive to the "special needs" of academic institutions. For if the Court's interpretation of the Rehabilitation Act is accurate, then the Congress also is unwilling to impose large burdens on schools in the name of social justice.

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[66] 442 U.S. at 412-13.
[67] *Id.* at 414.

V. Conclusion

Universities and colleges have become increasingly involved with governmental regulations and court suits during the 1970s. Despite these legal developments, it is fair to conclude that the academic community has fared well, especially when one considers that colleges and universities have increasingly looked to and depended upon governmental agencies as sources of funding.

The criticism that the implementation of federal regulations is draining our institutions of too much money has not been substantiated. Although it is not comforting to say that no one is sure how much federal regulation costs, it seems premature to say that it costs too much.

Critics also argue that the Federal Government's influence is forcing colleges' and universities' commitment to social justice goals to take precedence over their traditional goals of education and freedom, and that this shift is destructive to institutional or academic freedom. Yet, it is not clear that goals of education and freedom are inconsistent with social justice. Admittedly, the Federal Government historically had left the educational community alone, and educators have become comfortable in this autonomy. As a critical element in a successful society, however, education cannot expect to continue to be left completely autonomous, particularly since educational institutions have contributed to social injustices. Furthermore, the political branches of the government, as well as the courts, are well aware of the need to tread carefully in holding higher education accountable for its public trust;

it is highly unlikely that governmental regulators will significantly constrain academic freedom in the years to come.

Moreover, critics like Professor Shils and the Sloan Commission point to no hard data or meaningful research to back up their claims that federal regulations—even equal opportunity regulations—have disrupted academic freedom. Reports like the one from the Sloan Commission, however, are troubling not only for their lack of supporting data. The broad assertions in the *Sloan Report* about the disruptive effects of litigation conflict sharply with the Commission's own proposed solution to allow an agency to cut off funds for violations of anti-discrimination laws and regulations. If the Commission is serious in suggesting that its proposed agency would be more effective than litigation, surely the sanction available to the proposed agency is more drastic and disruptive of scholarly pursuits than a rare court order to hire someone because of unlawful discrimination.[68]

In the next decade the disruptive effects of external regulations—whatever they may be—will likely decrease. Court suits against institutions of higher education will continue to flourish for a time, as the courts flesh out the meaning of various federal laws passed during the past two decades. Faculty members will file suits as colleges and universities face continued financial retrenchment. But unless court opinions change dramatically, universities

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[68] Indeed, this is one of the points made by the Supreme Court in its decision in *Cannon v. University of Chicago, supra* note 60.

and colleges will continue to win many of these suits. In addition, as institutions of higher education win in court, the significance of rigid administrative regulations—which have been the subject of so much controversy and criticism in recent years—will surely diminish.

If higher education has suffered in the past from overly restrictive legislation and regulations, it is in part because educators have been unable or unwilling to lobby for concessions in the appropriate legislatures and administrative agencies. In recent years, however, the higher education lobbying effort has improved. In the 1980s it is likely to be both sophisticated and effective. Even if higher education is subject to further legislation, effective lobbying efforts will produce bills that are better designed to take account of the special needs of academia.

Within the next few years the courts will give further guidance as they resolve cases posing a direct clash between individual protections and institutional autonomy. The results in these cases will offer some important clues about future directions in the area of higher education and the law. For now, though, "academic abstention" is alive and well.

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(Note: "*U.S.*" citations refer to opinions by the United States Supreme Court; "*F.2d*" refers to opinions by the United States Court of Appeals, with "*Cir.*" designating the Circuit; "*F. Supp.*" refers to opinions by a Federal District Court; "*Neb.*" refers to an opinion by the Nebraska Supreme Court; "*N.J. Super.*" refers to an opinion by the Appellate Court of New Jersey.)

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